

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 02-223V

Filed: December 20, 2006

NOT TO BE PUBLISHED

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RYAN KELLEY,

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Petitioner,

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v.

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Damages, Proffer on Award of  
Compensation, Findings by  
the Special Master

SECRETARY OF THE DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

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Respondent.

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*Ron Homer, Conway, Homer, and Chin-Caplan, Boston, MA, for petitioner*

*Heather Pearlman, U.S. Department of Justice, Washington, D.C., for respondent*

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**DECISION ON REMAND<sup>1</sup>**

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**GOLKIEWICZ**, Chief Special Master.

\_\_\_\_ On August 31, 2005, this case was remanded for damages. After extensive cooperative efforts to resolve the damages issue, the parties reached an impasse. On April 18, 2006 a Hearing on damages was convened to determine the appropriate amount of compensation for petitioner's pain and suffering award and the future medical needs of petitioner. Testifying for the petitioner were Ryan Kelley, Douglas Kelley, petitioner's father, and Dr. Carlo Tornatore, medical expert. Testifying for the respondent was Dr. Vinay Chaudhry, medical expert. On

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<sup>1</sup>The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

December 7, 2006, respondent filed his Proffer on Award of Compensation for the items over which no dispute exists and to which petitioner agrees. The case is now ripe for decision.

After a complete review of the record and based upon the evidence adduced at the Hearing on damages, the court finds that petitioner, Ryan Kelley, is entitled to an award under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 et seq., as reflected in Respondent's Proffer on Award of Compensation and the attached chart at **Tab B, *Items of Compensation for Ryan Kelley***, and in the undersigned's Findings and Order, filed Apr. 20, 2006. At the April 18 Hearing, the undersigned made the following findings: 1) amount for pain and suffering: \$100,000 for past pain and suffering; \$100,000 for future pain and suffering; 2) there was insufficient evidence, from the testimony provided at the Hearing that Mr. Kelley will relapse, to provide an award for disability or long-term care insurance. The court is convinced, based upon its experience and information in the record, that this award shall provide reasonable compensation to cover Ryan Kelley's vaccine-related expenses.

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**Form of Compensation Award**

1. **Growth Rate:**

The appropriate growth rate for all items of compensation is 4% compounded annually from the date of judgment.

2. **Lump Sum:**

A lump sum payment in the amount of **\$203,145.93**, representing compensation for past unreimbursed expenses (\$4,105.84), past and future pain and suffering (\$167,413.00), and life care expenses for Year One (\$31,627.09), shall be payable in the form of a check to Ryan Kelley.

3. **Annuity:**

Section 15(f)(4) requires that payment of compensation be based on the net present value of the elements of compensation. One way of discounting to net present value is to use the cost of an annuity to provide periodic payments to meet projected needs of a petitioner for the remainder of his life. Special masters are specifically empowered by §15(f)(4) of the Act to order that the compensation awarded under the Program be used to purchase an annuity. The court considers it in Ryan Kelley's best interest to order that the compensation for life care items awarded beyond year one post-judgment be paid in the form of an annuity, which annuity shall be purchased as soon as practicable after entry of judgment.

The court awards an amount sufficient to purchase an annuity contract(s), subject to the conditions described below, that will provide payments for the life care items contained in the amended life care plan, as illustrated by the chart at Tab B attached hereto, paid to the life insurance company from which the annuity(ities) will be purchased. Compensation for Year

Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity(ities), which annuity(ities) shall make payments directly to Ryan Kelley only so long as Ryan Kelley is alive at the time a particular payment is due, for all items of care set forth in the attached chart.

At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the attached chart at Tab B describe only the total yearly sum to be paid to the trustee and do not require that the payment be made in one annual installment.

The annuity company must meet the following criteria:<sup>2</sup>

- 1) has a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) has one of the following ratings from two of the following rating organizations:
  - a) A.M. Best Company: A+, A+g, A+p, A+r or A+s;
  - b) Moody's Investors Service Claims Paying Rating: Aa3, Aa2, Aa1 or Aaa;
  - c) Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+ or AAA;
  - d) Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+ or AAA.

4. **Life Contingent Annuity:**

A finding on life expectancy is unnecessary because this annuity will be a lifetime annuity. Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as Ryan Kelley is alive at the time that a particular payment is due. The Personal Representative of the Estate of Ryan Kelley shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Ryan Kelley's death.

## CONCLUSION

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<sup>2</sup>These criteria are taken from the December 1990 draft of the Uniform Periodic Payment of Judgments Act.

Petitioner, Ryan Kelley, is entitled to an award under the Vaccine Program to provide for compensable expenses as stated in the attached chart at Tab B. Petitioner's award of compensation shall be in the form of an annuity as provided for in paragraph 3 above, together with the following lump sum payment:

1. A lump sum payment in the amount of **\$203,145.93**, representing compensation for past unreimbursed expenses (\$4,105.84), past and future pain and suffering (\$167,413.00), and life care expenses for Year One (\$31,627.09), shall be payable in the form of a check to Ryan Kelley.

Based on the foregoing, this Court adopts the parties' Proffer and finds, based on the evidence adduced at the Hearing on damages, that petitioner is entitled to compensation in the amount and on the terms set forth therein. The Clerk of the Court is directed to enter judgment according to this decision.<sup>3</sup>

**IT IS SO ORDERED.**

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Gary J. Golkiewicz  
Chief Special Master

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<sup>3</sup>Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.